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NO. 94-1014

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

MIKE M. NDEFRU,
Petitioner,

v.

DR. PETER M.A. SHERWOOD,
DR. DALE M. HAWLEY,
DR. KENNETH J. KLABUNDE,
DR. MICHAEL J. O'SHEA,
DEAN TIMOTHY R. DONOGHUE,
DEAN BRADLEY FENWICK,
DEAN ELIZABETH A. UNGER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Cheryl G. Strecker
Counsel of Record for Respondent
Kansas State University
Office of University Attorney
111 Anderson Hall
Manhattan, Kansas 66506-0115
(913)532-5730

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QUESTION PRESENTED

The respondents are dissatisfied with the petitioner's presentation of questions presented. Should the petition for a writ of certiorari be granted, the question presented for review should be the following:

> Did the Tenth Circuit correctly affirm the District Court's dismissal of a complaint alleging: (1) violation of a former graduate student's due process rights based on his advisory committee's rejection of his proposed oral examination topic; and (2) violation of the former student's right to be free from unreasonable searches and seizures based on allegations that his major professor looked

through papers in a shared office to retrieve documents he had loaned to the student?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

Although the petitioner presents the opinions and judgments in the courts below as Appendices A, B, C, and D to his petition, his reproduction of each contains numerous inaccuracies. Therefore, the respondents have attached hereto accurate reproductions of the opinions and judgments in the courts below as Appendices R-A, R-B and R-C.

JURISDICTION

The respondents are dissatisfied with the jurisdictional grounds stated by the petitioner. He does not indicate any statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of

certiorari, as required by Rule 14.1(e)(iv) of the Rules of the Supreme Court of the United States. Rather, he states that "[t]his Court's jurisdiction is invoked under Rules 10.1(a) and 10.1(c) of the U.S. Supreme Court." (Petition at 4)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The respondents agree with the petitioner's statement of constitutional and statutory provisions involved, which he sets forth in Appendices G and H to the petition.

STATEMENT OF THE CASE

On June 7, 1993, the petitioner filed a complaint in the United States District Court for the District of

Kansas, claiming that the respondents, who are members of the faculty and administration of Kansas State University, deprived him of due process in rejecting his proposed oral examination theme in Chemistry. The petitioner claimed that this action had the effect of dismissing him from the University. He also claimed that one of the defendants, his major professor, unlawfully searched his office by looking through a pile of research papers, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The petitioner claimed monetary damages in the amount of $5,612,500.00.

The respondents filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On December 29, 1993, the

District Court entered an order granting the respondents' motion to dismiss, ruling that: (1) the petitioner failed to demonstrate that he had been deprived of a liberty or property interest; and (2) the petitioner failed to allege sufficient facts to demonstrate that his major professor was acting as a government agent when he allegedly searched the petitioner's papers. As the District Court ruled in favor of the respondents on the foregoing issues, it did not reach the issue of the respondents' entitlement to qualified immunity. The District Court's Judgment and attached Memorandum and Order granting the respondents' motion to dismiss is appended hereto as Appendix R-B.

The petitioner appealed the District Court's decision to the United States Court of Appeals for the Tenth Circuit, contending that the District Court ignored facts, misstated the issues, demonstrated absolute disregard for process of any form, promoted fraudulence, and advocated dictatorship in granting the motion to dismiss. On August 4, 1994, the Tenth Circuit Court of Appeals, after reviewing the parties' arguments, the record on appeal, and the relevant law, affirmed the judgment of the District Court. The Tenth Circuit's Order and Judgment is appended hereto as Appendix R-A.

The petitioner filed a petition for rehearing in the Tenth Circuit Court of Appeals. On September 7,

1994, the Court of Appeals entered an order denying the petition for rehearing. That order is appended hereto as Appendix R-C.

SUMMARY OF ARGUMENT

The District Court properly dismissed the petitioner's complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6), for the reasons stated in its Memorandum and Order. (See Appendix R-B.) The Tenth Circuit Court of Appeals properly affirmed the District Court's dismissal of the complaint.

The petitioner has failed to present any reason for this Court to grant review on a writ of certiorari. He does not raise a conflict of decisions between courts of appeals or

state courts of last resort, or an important question of federal law that has not been, but should be, settled by this Court, or a federal question that conflicts with applicable decisions of this Court. In his petition, he merely reiterates the arguments he made in the courts below, asserting the unfairness of the respondents' rejection of his proposed oral examination topic and the illegality of the alleged search of his papers by his major professor.

Furthermore, the petitioner has failed to comply with Rule 14 of the Rules of the Supreme Court of the United States, which sets forth the requirements for the content of a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The petitioner's statements of fact and law are confusing and replete with inaccuracies. Rather than specifically addressing each inaccuracy, the respondents adopt and refer this Court to the statements of fact and discussion of law set forth in the District Court's Memorandum and Order. (See Appendix R-B at App. 7-34.)

A. THE PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The District Court properly granted, and the Tenth Circuit properly affirmed, the dismissal of the petitioner's complaint for the reasons stated in the District Court's Memorandum and Order. (See Appendix R-

B at App. 7-34.)

The District Court considered the motion to dismiss under the proper standard for review, accepting all factual allegations of the complaint as true, and drawing all reasonable inferences in favor of the petitioner, citing Zilkha Company Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990). The District Court took into consideration the fact that the petitioner appeared pro se, citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). (See Appendix R-B at App. 10-12.)

Applying the foregoing standard, the District Court carefully scrutinized the petitioner's 253-page complaint, as well as the arguments advanced by the petitioner in his 29-

page response to the respondents' motion to dismiss. (See Appendix R-B at App. 12-19.)

The District Court properly set forth the elements which a plaintiff must establish in order to prevail in an action brought pursuant to 42 U.S.C. §1983; i.e., (1) that the actions complained of were done by a person acting under color of state law, and (2) that these actions deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. The District Court cited Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1556 (10th Cir. 1993); Dixon v. City of Lawton, Okl., 898 F.2d 1443, 1447

(10th Cir. 1990); Tarabishi v. McAlester Regional Hospital, 827 F.2d 648, 651 (10th Cir. 1987); and Greco v. Guss, 775 F.2d 161, 164 (7th Cir. 1985). (See Appendix R-B at App. 19-21.)

The District Court properly held that the protection of procedural due process is not available until a plaintiff establishes the existence of a recognized property or liberty interest, citing Southeast Kansas Comm. Action Program, Inc. v. Lyng, 758 F.Supp. 1430, 1432 (D.Kan. 1991) (citing Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1394 (10th Cir. 1988), aff'd, 967 F.2d 1452 (10th Cir. 1992); and Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). (See Appendix R-B at

App. 21-22.)

The District Court noted that the United States Supreme Court has held that academic decisions and judgments about a student, as opposed to disciplinary decisions, are entitled to deference by the courts, citing Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985); Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978); and Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986). (See Appendix R-B at App. 22-24.)

Analyzing the petitioner's complaint under applicable law, the District Court properly found that the petitioner did not have a property or a liberty interest in having a proposed topic of oral examination

approved by his teachers and academic advisors. While acknowledging the petitioner's assertion that the respondents' actions ultimately led to his dismissal from the University, the District Court properly found that allegation not to be factually supported by a fair reading of the entire complaint. Additionally, citing Jensen, 998 F.2d at 1559, the District Court properly held that the petitioner's claim that he has been deprived of liberty interests in his good name and reputation and ability to pursue a career in chemistry fails because: (1) there is no allegation that any of the unfavorable information about the petitioner has been disseminated to the public; (2) from the allegations made by the

petitioner, it does not appear that the respondents' actions and statements concerning his competency are stigmatizing; and (3) damage to prospective employment opportunities is too intangible to constitute deprivation of a liberty interest. (See Appendix R-B at App. 24-31.)

The District Court properly held that the petitioner's Fourth Amendment claims fail because the protections of the Fourth Amendment apply only to governmental action and, assuming arguendo that the petitioner had a reasonable expectation of privacy in the pile of papers which his major professor searched, and assuming arguendo that the search was unreasonable under the circumstances, the petitioner failed to allege

sufficient facts to demonstrate that the professor was acting as a government agent. (See Appendix R-B at App. 31-34.)

B. THIS CASE PRESENTS NO CONFLICT OR UNSETTLED QUESTION OF LAW NECESSITATING SUPREME COURT REVIEW.

Rule 10 of the Rules of the Supreme Court of the United States provides that a petition for writ of certiorari will be granted "only when there are special and important reasons therefor." S.Ct.R. 10.1. Rule 10 indicates the character of reasons that will be considered by this Court in deciding whether to grant a review on writ of certiorari. The petitioner has failed to present any such reason for this Court to grant review in this case. He does not raise a conflict of

decisions between courts of appeals or state courts of last resort, or an important question of federal law that has not been, but should be, settled by this Court, or a federal question that conflicts with applicable decisions of this Court. In his petition, he merely reiterates the arguments he made in the courts below, asserting the unfairness of the respondents' rejection of his proposed oral examination topic and the illegality of the alleged search of his papers by his major professor.

In addition to the petitioner's failure to assert any of the reasons set forth in Rule 10 or any other valid reason for this Court to grant review of this case, the respondents are not aware of the existence of any

such reason.

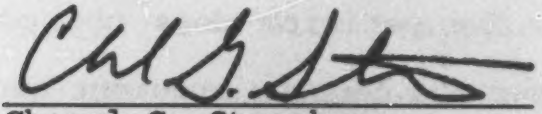
C. THE PETITIONER HAS FAILED TO COMPLY WITH THE REQUIREMENTS IN SUPREME COURT RULE 14 REGARDING THE CONTENT OF A PETITION FOR A WRIT OF CERTIORARI.

The petition does not contain a direct and concise argument amplifying the reasons relied on for allowing the writ. The petitioner has failed to present with accuracy, brevity, or clearness whatever is essential to a ready and adequate understanding of the points requiring consideration by this Court. For the foregoing reasons, the petitioner has failed to comply with Rule 14 of the Rules of the Supreme Court of the United States, which sets forth the requirements for the content of a petition for writ of certiorari.

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



Cheryl G. Strecker
Assistant University Attorney
111 Anderson Hall
Kansas State University
Manhattan, Kansas 66506-0115
(913) 532-5730

APPENDIX R-A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3021
(D.C. No. 93-CV-4127)
(D. Kan.)

MIKE M. NDEFRU,

Plaintiff-Appellant

v.

DR. PETER M.A. SHERWOOD; DR. DALE M. HAWLEY; DR. KENNETH J. KLABUNDE; DR. MICHAEL J. O'SHEA; TIMOTHY R. DONOGHUE, Dean; BRADLEY FENWICK, Dean; ELIZABETH A. UNGER, Dean,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before MOORE and KELLY, Circuit Judges, and BABCOCK,** District Judge.

**Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

After examining the briefs and

appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Mike M. Ndefru filed this action under 42 U.S.C. § 1983 alleging deprivation of due process in connection with the decision of members of the Chemistry Department at Kansas State University to reject his propositional oral examination theme. Plaintiff further contended that this decision defamed him and ultimately resulted in his dismissal from the University, and that his belongings were unlawfully searched by defendant Sherwood. A grievance hearing held by

the University has earlier found against plaintiff on all issues he raised.

The district court granted defendants' motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b) (6). After careful review of the parties' arguments, the record on appeal, and the relevant law, we affirm the judgment of the district court for substantially the reasons stated by that court.

The judgment of the United States District Court for the District of Kansas is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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* This order and judgment is not binding precedent, except under the

doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

APPENDIX R-B

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-4127-SAC

MIKE M. NDEFRU,

Plaintiff,

v.

DR. PETER M.A. SHERWOOD,
DR. DALE M. HAWLEY,
DR. KENNETH J. KLABUNDE,
DR. MICHAEL J. O'SHEA,
DEAN TIMOTHY R. DONOGHUE,
DEAN BRADLEY FENWICK,
DEAN ELIZABETH A. UNGER,

Defendants.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss is granted. IT IS FURTHER ORDERED that

plaintiff take nothing, that the action be dismissed on the merits, and that defendants Dr. Peter M.A. Sherwood, Dr. Dale M. Hawley, Dr. Kenneth J. Klabunde, Dr. Michael J. O'Shea, Dean Timothy R. Donoghue, Dean Bradley Fenwick, and Dean Elizabeth A. Unger recover of the plaintiff Mike M. Ndefru, their costs of action.

ENTERED ON THE DOCKET: 12/29/93

December 29, 1993
Date

Ralph L. DeLOACH
Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 93-4127-SAC

MIKE M. NDEFRU,

Plaintiff,

Vs.

DR. PETER M.A. SHERWOOD,
DR. DALE M. HAWLEY,
DR. KENNETH J. KLABUNDE,
DR. MICHAEL J. O'SHEA,
DEAN TIMOTHY R. DONOGHUE,
DEAN BRADLEY FENWICK,
DEAN ELIZABETH A. UNGER,

Defendants.

MEMORANDUM AND ORDER

On June 7, 1993, the plaintiff, Mike M. Ndefru, filed a 253-page complaint alleging claims under 42 U.S.C. § 1983. Ndefru, in substantial detail, claims that the defendants have deprived him of due process in the rejection of his propositional oral examination theme in Chemistry at

Kansas State University (KSU). Ndefru contends that this action ultimately resulted in his dismissal from KSU. Ndefru also claims that Dr. Sherwood unlawfully searched his belongings. Ndefru claims that this search of his belongings violated his rights as guaranteed by the Fourth Amendment and Fourteenth Amendments. Ndefru claims total damages in the amount of $5,612,000.

This case comes before the court upon the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6). The defendants argue that the plaintiff has not been deprived of a liberty or property interest. The defendants also argue that even if the plaintiff was deprived of a liberty or property interest, the plaintiff has

plead insufficient facts to indicate that they acted arbitrarily, capriciously or in bad faith in depriving the plaintiff of such an interest. The defendants argue that plaintiff's Fourth Amendment claims must fail as Dr. Sherwood's actions did not deprive the plaintiff of his right to be free from unreasonable searches and seizures by the government. The defendants also contend that they are entitled to qualified immunity.

Ndefru has filed a 29-page response to the defendants' motion to dismiss. In that response, Ndefru challenges the defendants' factual summation of his complaint. Ndefru argues that the defendants cannot redraft his complaint so as to ignore

the specific facts alleged. Ndefru contends that it is clear that his claims should survive the defendants' motion to dismiss.

The court, having carefully considered the briefs of the parties, the plaintiff's voluminous complaint, and the applicable law, is now prepared to rule.

Standards for Granting a Motion to Dismiss

In considering a motion for dismissal under Fed. R. Civ. P. 12(b)(6), the court must

> accept all factual allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff." Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990). Dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(6) requires the legal determination that the plaintiff can prove no set of facts in support of his claim to entitle him to relief.

(citations omitted).

Hospice of Metro Denver v. Group Health Ins., 944 F.2d 752, 753 (10th Cir. 1991); see Thatcher Enterprises v. Cache County Corp., 902 F.2d 1472 (10th Cir. 1990).

In analyzing the plaintiff's complaint, the court has taken into consideration the fact that he appears pro se. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). "At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant." Id. See Drake v. City of Fort Collins, 927 F.2d 1156,

1159 (10th Cir. 1991) ("Despite liberal construction afforded pro se pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues.").

Overview[1]

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[1] The court notes that the plaintiff's complaint is neither short nor plain as required by Fed. R. Civ. P. 8. The plaintiff's complaint is often redundant and is extremely difficult to follow. Nevertheless, the court has attempted to distill the essential aspects of the plaintiff's complaint into an accurate, albeit truncated, summation of the alleged facts. By summarizing the basic facts alleged in the plaintiff's complaint, the court has simply endeavored to reduce the operative facts to a manageable level. The court has carefully scrutinized the plaintiff's complaint. In considering the plaintiff's response to each of the defendant's arguments, the court has also carefully considered the arguments advanced by the plaintiff, as well as the portions of his complaint as referenced in his response to the defendants' motion.

Ndefru, apparently not a United State citizen, is studying in the United States on a student visa. While at Eastern Kentucky University, Ndefru earned a bachelors degree in Chemistry, a bachelors degree in Biology, a masters degree in Chemistry, and a masters degree in Biology. Ndefru apparently had very good grades while at Eastern Kentucky University. Following his studies at Eastern Kentucky University, Ndefru was admitted to four universities to pursue a Ph.D. degree in Chemistry.

In short, while the court has considered all of the arguments of the parties and has scrupulously reviewed the plaintiff's complaint in its entirety, this memorandum and order will not attempt to repeat in full the substance of the arguments of the parties, nor will the court endeavor to discuss in exacting detail all 253 pages of the plaintiff's complaint.

Ndefru chose KSU.

During the events relevant to this case, Ndefru was a graduate student in the Chemistry Department at KSU. Ndefru was a member of a research group composed of graduate students in the Chemistry Department. The head of the group was Dr. Peter Sherwood, who was also Ndefru's major research advisor.

Ndefru's proposed topic for his propositional oral examination dealt with the analysis of chlorinated hydrocarbons using gas sensor. Although Ndefru believed his proposed oral examination theme to be superior to the topics proposed by other students, the supervisory committee rejected the plaintiff's propositional oral examination theme. Instead, the

committee attempted to persuade Ndefru to work on an alternative proposal, the "Surface Science" proposal. Ndefru claims that the supervisory committee's proposals were inferior to his proposed topic.[2] Ndefru's complaint states that "[t]he committee wanted, through the Surface Science project, the plaintiff to milk a rock." Ndefru claims that the committee members, each of which were closely tied to Dr. Sherwood for financial and other reasons, rejected

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[2] The committee essentially indicated that the value of Ndefru's proposal was "minimal" as vastly superior technology to conduct the same analysis which the gas sensor would perform had already existed for thirty years. Ndefru contends that the gas sensor can provide analysis superior to analysis of available instruments at a fraction of the cost.

Ndefru's proposal primarily because Dr. Sherwood was actively opposed to it.

Ndefru complains that KSU and the Chemistry Department policies and regulations were not followed in rejecting his proposal. Ndefru also complains that he was not provided access to copies of the other student's proposals.

At some point, Dr. Sherwood removed Ndefru from the Surface Science research group. Ndefru filed a formal complaint with the Graduate School and the Chemistry Department.

On June 18, 1992, Ndefru was informed that a grievance hearing was scheduled for June 22, 1992. Ndefru's request for additional time to prepare was denied. Ndefru claims that

allowing him only "one-working-day's" notice violated his grievance rights. In addition, Ndefru's request for copies of the other student's proposals which had been approved was denied. The rules governing the grievance committee did not allow for cross-examination of the witnesses by Ndefru. Ndefru complains that certain witnesses were unavailable to appear at the grievance hearing. Ndefru also contends that members of the grievance committee either lacked the requisite skills and knowledge necessary to evaluate his proposal or that they were biased against him.

The grievance committee ultimately concluded that the Chemistry Department and Dr. Sherwood has treated Ndefru fairly and found

against Ndefru on all of the issues he had raised. The grievance committee report, which Ndefru claims was untimely prepared, was reviewed and approved by Dean Donoghue, Dean of the Graduate School. Although Dean Donoghue indicated that KSU would arrange for Ndefru to become a member of another research group, Ndefru apparently rejected that offer. Because that Surface Science group was the only Surface Science Group at KSU, Ndefru claims that his dismissal from the group essentially had the effect of dismissing him from KSU. Ndefru basically claims that these acts have destroyed his professional reputation.

Ndefru also claims that on May 9, 1992, Dr. Sherwood was going through his belongings which were in an area

shared by Ndefru and another student which served as an office for the two students. Ndefru's "office" area was apparently located in Dr. Sherwood's research laboratory. Dr. Sherwood was apparently looking for papers concerning nickel which he had previously loaned to Ndefru. Dr. Sherwood was looking through a pile of papers on Ndefru's desk when Ndefru entered the room. Ndefru objected to Dr. Sherwood's search for the papers, and now claims this search by Dr. Sherwood violated his constitutional rights.

42 U.S.C. § 1983

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create any substantive rights. Dixon v. City of Lawton, Okl., 898 F.2d 1443, 1447 (10th Cir. 1990). A § 1983 claims generally described a substantive violation of a right secured by the Constitution or law. Id.

Under 42 U.S.C. § 1983, the plaintiff must establish (1) that the actions complained of were done by a person acting under color of state law, and (2) that these actions deprived the plaintiffs of rights, privileges or immunities secured by

the Constitution or laws of the United States. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1556 (10th Cir. 1993); Greco v. Guss, 775 F.2d 161, 164 (7th Cir. 1985); See Dixon, 898 F.2d at 1447. Whether a person is subject to a § 1983 suit turns upon the ultimate question of whether the alleged infringement of federal rights is fairly attributable to the state. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Tarabishi v. McAlester Regional Hosp., 827 F.2d 648, 651 (10th Cir. 1987).

Due Process

"The protection of procedural due process is not available until the plaintiff establishes the existence of a recognized property or liberty interest." Southeast Kansas. Comm.

Action Program, Inc. v. Lyng, 758 F. Supp. 1430, 1432 (D. Kan. 1991) (citing Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384, 1394 (10th Cir. 1988)), aff'd, 967 F.2d 1452 (10th Cir. 1992). "The range of interests protected by procedural due process is not infinite." Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961). The Supreme Court has held that academic decisions and judgments about a student, as opposed to disciplinary decisions, are entitled to deference

by the courts. See Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985); Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."); Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986) ("The Supreme Court has emphasized that less stringent procedural requirements attach when a school makes an academic judgment about a student than when it takes disciplinary action."), cert. denied, 479 U.S. 1033 (1987).

In Horowitz, a medical student challenged her dismissal by the University of Missouri-Kansas City Medical School. The student argued that the medical school had not provided her with procedural due

process prior to her dismissal. The Supreme Court disagreed and held that the student had received procedural due process as she had received notice of her impending dismissal and that the decision to dismiss her was careful and deliberate. 435 U.S. at 85.

Property Interest

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have legitimate claim of entitlement to it." Id. 408 U.S. at 577. "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed

except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

Liberty Interest

In Southeast Kansas Comm. Action Program, this court summarized the law concerning a cause of action based upon a deprivation of a liberty interest:

> Notwithstanding the absence of a property interest, a procedural due process hearing may still be necessary if a liberty interest is implicated. Rich v. Secretary of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984). In Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Supreme Court considered the issue of whether the plaintiff who was allegedly defamed by a flier circulated by the police department bearing his name and photograph which supposedly depicting "active shoplifters" stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. The Court concluded that injury alone to reputation does not violate the

liberty or property interests of the due process clause. The Court stated that there is "no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Id. at 702. The proper remedy for such an injury is through a state tort action for defamation. Id. at 697-699. In Paul, the Court concluded that the plaintiff had suffered no constitutional injury because he could not "assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment." Id. at 712.

Thus, in order to present a viable liberty deprivation claim, the plaintiff must demonstrate more than a mere injury to reputation; due process requirements are not triggered unless the injury to reputation is entangled with the loss of a more tangible interest. See Setliff, 850 F.2d at 1396. The plaintiff is also required to demonstrate that the publication of information was false and stigmatizing. See Derstein v. State of Kan., 915 F.2d 1410 (10th Cir 1990); Conoway v. Smith, 853 F.2d 789, 794 (10th Cir 1988); Sipes v. United

> States, 744 F.2d 1418, 1421 (10th Cir. 1984).
>
> ...
>
> A statement is not stigmatizing if it merely alleges incompetence, negligence, low productivity and dereliction. See Sullivan v. Stark, 808 F.2d 737, 739 (10th Cir. 1987). In order for a statement to be stigmatizing, a statement must allege dishonesty, stealing or some other allegation that gives rise to a 'badge of infamy,' public scorn, or the like; See Wells v. Hico Independent School Dist., 736 F.2d 243, 256 n. 16 (5th Cir. 1984); Bailey v. Kirk, 777 F.2d 567, 580, n. 18 (10th Cir. 1985)

758 F. Supp. at 1433-1434; see Jensen, 998 F.2d at 1558-1559.

Analysis

Due Process Claim

As the defendants suggest, Ndefru has failed to demonstrate that he has been deprived of a liberty or property interest. Essentially, the plaintiff's case boils down to whether

a university student has a property or liberty interest in having a proposed oral topic approved by his teachers and academic advisors. Simply put, Ndefru does not have a property or liberty interest in having his proposed topic on a gas sensor approved, irrespective of the fact that he may regard his proposed topic to be superior to topics approved for other students, and irrespective of his self-appraisal of the relative merits of his topical proposal and his academic advisors' recommended or required course of study. The plaintiff's disappointed expectations of researching a preferred topic are not a basis of any cognizable liberty or property interest. Nor does the fact that Ndefru's subsequent efforts

to overrule the decision of his academic advisors regarding his topical proposal were unsuccessful implicate a liberty or property interest.[3] In short, the plaintiff's complaint does not allege a sufficient factual basis to demonstrate that the defendants' actions have deprived him

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[3] Ndefru's complaint on several occasions challenges the defendant's adherence to the applicable rules and regulations in considering his proposed topical area and in addressing his subsequent grievance. The court simply notes that the defendants' failure to rigidly adhere to the University's rules and regulations would not, in and of itself, serve as a basis for a § 1983 claim. See Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991) ("The Due Process Clause of the Constitution... does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones...").

of any liberty or property interest.[4]

Ndefru's claim that he has been deprived of liberty interests in his good name and reputation and his ability to pursue a career in chemistry fails for at least two reasons. First, there is no allegation that any of the unfavorable information about Ndefru has been disseminated to the public; the intra-university dissemination of this information cannot serve as basis for

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[4] The plaintiff makes the blanket assertion that the defendants' actions ultimately lead to his dismissal from KSU. While such allegations might implicate a property or liberty interest, that allegation is not factually supported by a fair reading of the entire complaint. In fact, it appears that once the grievance committee's decision was reached, Ndefru was encouraged to find a new major professor to complete his studies at K.S.U.

this claim. Harris, 798 F.2d at 422-23 n. 2. Second, from the allegations found in Ndefru's complaint and the arguments made in his response to the defendants' motion, it does not appear that the defendants' actions and statements concerning his competency are stigmatizing. Moreover, "[d]amage to prospective employment opportunities is too intangible to constitute deprivation of a liberty interest," Jensen, 998 F.2d at 1559.

In sum, Ndefru's due process claims are dismissed for failure to state a claim upon which relief may be granted.

Fourth Amendment Claim

The Fourth Amendment to the United States Constitution protects a person's right to be secure from

unreasonable searches and seizures. United States v. Walsh, 791 F.2d 811, 814 (10th Cir. 1986). The Fourth Amendment to the Constitution is applicable to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). "The protections of the fourth amendment, however, apply only to governmental action; a search or seizure, even if unreasonable, performed by a private person not acting as a government agent or in concert with a government official is not within the scope of the fourth amendment." Walsh, 791 F.2d at 814 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "The test for determining whether one is acting as a government agent is whether 1) the government knew of the

acquiesced in the intrusive conduct; and 2) the party performing the search intended to assist law enforcement efforts or further his own ends." United States v. Lowe, 999 F.2d 448, 450 n. 4 (10th Cir. 1993) (citing Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989)).

Assuming, arguendo, that Ndefru has a reasonable expectation of privacy in the pile of papers which Dr. Sherwood searched, and assuming, arguendo, that Dr. Sherwood's search was unreasonable under the circumstances, Ndefru has failed to allege sufficient facts to demonstrate that Dr. Sherwood was acting as a government agent at the time he searched for the "nickel" papers. Therefore, Ndefru's Fourth Amendment

claims necessarily fail.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss (Dk. 12) is granted.

Dated this 29th day of December, 1993, Topeka, Kansas.

/s/ Sam A. Crow
U.S. District Judge

APPENDIX R-C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3021

MIKE M. NDEFRU,

Plaintiff-Appellant

v.

DR. PETER M.A. SHERWOOD; DR. DALE M. HAWLEY; DR. KENNETH J. KLABUNDE; DR. MICHAEL J. O'SHEA; TIMOTHY R. DONOGHUE, Dean; BRADLEY FENWICK, Dean; ELIZABETH A. UNGER, Dean,

Defendants-Appellees.

ORDER
Entered September 7, 1994

Before MOORE and KELLY, Circuit Judges, and BABCOCK, District Judge.

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*Honorable Lewis T. Babcock, District Judge, United States District Judge for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

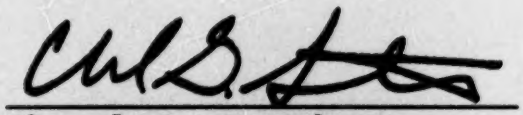
PATRICK FISHER, Chief Deputy Clerk

By /s/ Jim Powers
Deputy Clerk

CERTIFICATE OF SERVICE

I, Cheryl G. Strecker, hereby certify that I served three copies of the foregoing Respondents' Brief In Opposition by depositing the same in the U.S. mail, postage prepaid, this 21st day of Dec., 1994, addressed to:

Mike M. Ndefru
P.O. Box 234
Manhattan, KS 66502-0002



Cheryl G. Strecker
Assistant University Attorney
Kansas State University
111 Anderson Hall
Manhattan, KS 66506-0115
(913)532-5730